BRIEF

IN SUPPORT OF PETITION FOR A

WRIT OF CERTIORARI

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

ARTHUR ELD and LORINE KINZ, Petitioners, vs. THE PEOPLE OF THE STATE OF CALIFORNIA, Respondents.	No._____

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

OPINION OF THE COURT BELOW

The opinion is not reported, but may be found at R. p. 41.

II.

JURISDICTION

The basis upon which this court's jurisdiction rests is fully set out in the Petition for a Writ of Certiorari, supra, pp. 2-4

III.

ABSTRACT

Petitioners were arrested, charged and convicted of violating Ordinance 3-6.01 of the City of Oakland. Said Ordinance is set out in the Petition for Writ of Certiorari, supra, p. 2. The evidence showed that petitioners and some seventeen (17) other persons were engaged on the evening of April 6, 1940 in picketing the grocery and market of one SHORD T. ROMLEY, at Seventh and Campbell Streets, Oakland, California. (R.p.29). Petitioners and other pickets were members of a Jobs for Negroes Committee, which was trying to obtain equal job opportunities for Negroes in west Oakland, where Romley's Market was located, (R. p. 33,34) and where the population is predominantly Negro. (R.p.34). The Jobs for Negroes Committee prior to the picket line of April 6, 1940, had complained to Romley because of his discharge of a Negro employee. (R. p.33). While picketing, petitioners and the other pickets wore banners across their chests, bearing the following inscriptions: "Jobs for Negroes," "No Discrimination," "Do Not Patronize," "Unfair to Colored People." (R. p.27).

There was testimony that a crowd of four to five hundred persons gathered to watch the pickets. (R. p.28). The pickets marched several paces apart in an uneven circle in front of Romley's store. The petitioners and pickets were peaceful at all times. (R. p.30. The petitioners and pickets did not intimidate anyone, nor use violence, nor coercion of any kind. (R. p.30).

Petitioners and pickets distributed leaflets which they handed to passers-by who took the leaflets voluntarily. (R. p. 27-28). One of the People's witnesses, Sargeant E. F. Risedorph, in charge of a police squad, came upon the scene when petitioners and other pickets were picketing, and commanded them to "Move on; Clear the sidewalk; Break it up and get moving." (R. p. 29). Risedorph testified that while it was difficult for other persons to pass by on the sidewalk, it was possible for passers-by to pass through the picket line, and that he did not see any of the pickets or petitioners try to stop any person from passing. (R. p. 30). Another police officer, H. O. Fisher, called by the people, testified that he saw passers-by "elbow their way through the crowd" (R. p. 30). Fisher testified that the picketline and petitioners were entirely peaceful, and that neither petitioners nor any other pickets tried to stop any passers-by (R. p. 31). The people called one Nick Billicich, who testified that he owned a gasoline station across the street from Romley's, and that on the evening of April 6, 1940, he saw petitioners picketing in front of Romley's. While Billicich testified that "there was such a crowd in front of Romley's, you couldn't get through," he nevertheless crossed the street, passed through the crowd, went into Romley's Store, where he got some change, and passed back through the crowd and returned to his gasoline station (R. p. 32). Neither petitioners nor any other pickets tried to stop him from going in or out of the market, and one of the

pickets gave Billicich a leaflet, which he took voluntarily (R. p. 33).

George Kanaris testified for the People that he worked near Romley's and that when he left work with his wife "there was such a crowd you couldn't get through," but that he didn't try to get through (R. p. 31).

Louis De Castro, called by the People, largely testified in the same manner as did the other police officers (R. p. 32).

The defendants put on various witnesses who testified that petitioners and other pickets were engaged in peaceful picketing, carrying banners, distributing leaflets, and that the pickets did not block the sidewalk, did not try to stop anyone from passing, and that many persons passed along the sidewalk through the picket line without difficulty (R.p. 32-3

Reverend Henry Johnson, Pastor of the Negro Taylor Memorial Methodist Church in Oakland, testified that he was Chairman of the Jobs for Negroes Committee, whose objectives were to secure equal job opportunities for Negroes, particularly in West Oakland, where Romley's store was located, and where most of Oakland's Negro population lives, and that the Committee was trying to bring about a better understanding between white persons and Negroes on the subject of the serious economic plight of the Negroes who were discriminated against in the matter of jobs. He testified that he called upon Romley with other members of the Committee prior to the

establishment of the picket line in order to settle the disagreement over Romley's discharge of a Negro employee, but that the controversy was not settled and the picket line resulted (R. p. 34).

The cause was argued, the jury instructed, and retired to return with verdicts finding the petitioners guilty as charged.

IV.

ASSIGNMENTS OF ERROR RELIED UPON

1. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted, is void upon its face, in that it abridges the constitutional liberties of freedom of speech, press, and assemblage, and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

2. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution, in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted does not provide any reasonably ascertainable standard of guilt; that said Ordinance is so broad, general and all-inclusive in its terms and language that it makes peaceful and lawful acts and con-

stitutionally protected activity criminal; that said Ordinance is vague, uncertain, ambiguous and indefinite, and does not properly or sufficiently describe the offense or offenses sought to be created and punished, and therefore is not a valid penal statute within the meaning of the due process clause of the Fourteenth Amendment to the United States Constitution; and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

3. That the petitioners, and each of them, were deprived of liberty and property without due process of law, in violation of the Fourteenth Amendment of the United States Constitution in that Ordinance No. 3-8.01, for alleged violations of which petitioners were convicted, was applied and enforced against petitioners, and each of them, in an unconstitutional manner, in that there was no evidence of any wrongful act or acts committed by petitioners, or either of them; that the evidence herein shows that petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, and thereby that they were exercising their constitutional rights of free speech, press and assemblage; that any obstruction to the sidewalk wherein petitioners were engaged in said activities, was purely incidental; and that said Ordinance No. 3-8.01 was enforced and applied by law enforcement officials of the State of California, to prevent and restrain said peaceful and lawful acts and con-

duct and the exercise of constitutionally protected civil rights and liberties by petitioners, and each of them, and that the Superior Court of the State of California, in and for the County of Alameda erred in failing to so hold.

4. That the trial court erred in refusing to give the following instructions requested by petitioners:

Defendants' Proposed Instruction No. 1

The right of peaceful picketing is guaranteed and protected by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 2

If you find from the evidence that the defendants were engaged in peaceful picketing it is your duty to find them not guilty.

Defendants' Proposed Instruction No. 3

If you find from the evidence that the defendants were engaged in peaceful picketing and that pedestrians were able to pass along the sidewalk where the picket line was maintained and were not molested nor prevented from passing by the picket line, you should find the defendants not guilty.

Defendants' Proposed Instruction No. 6

You are advised that the right to freely assemble on the street for the purpose of meeting and discussing public questions is guaranteed to all by the Fourteenth Amendment to the Constitution of the United States.

Defendants' Proposed Instruction No. 7

If you find from the evidence that the defendants met in the street for the purpose of publicising and discussing a public question you are instructed that these acts are not subject to punishment.

Defendants' Proposed Instruction No. 8

You are advised that before you can find the defendants guilty in this case you must be convinced beyond a reasonable doubt that they wilfully and intentionally obstructed the sidewalk in front of Romly's Market, and so as to prevent and for the purpose of preventing passers-by from passing along the said sidewalk.

That by refusing to give the above requested instructions, the trial court applied and enforced the said Ordinance No. 3-6.01 of the City of Oakland, County of Alameda, State of California in an unconstitutional manner against petitioners, and each of them, in that the trial court thereby failed to instruct the jury that if the petitioners were exercising their constitutional rights of free speech, press and assemblage in a peaceful and lawful manner, that they thereby could not be guilty of violating the said Ordinance, and that the said trial court thereby failed to follow the principle that if there was an incidental obstruction to the sidewalk, such act should not be punished but rather must yield to the superior constitutional rights

of free speech, press and assemblage; and that the trial court, by its failure to instruct the jury as requested by petitioners, and in failing to make clear the principle herein stated, deprived petitioners of due process of law within the meaning of the Fourteenth Amendment; and that the Superior Court of the State of California in and for the County of Alameda erred in failing to so hold.

V.

ARGUMENT

1. Ordinance 3-6.01 is void, upon its face, in that it takes away and bridges liberty of speech, press and assemblage, and deprives of property without due process of law in violation of the Fourteenth Amendment.

This Court has held that the right to engage in peaceful picketing is protected by the Fourteenth Amendment against abridgment by local law.

Carlson v. California, 84 L. Ed. (Adv.) 670

Thornhill v. Alabama, 84 L. Ed. (Adv.) 664

This Court has also held that the right to distribute leaflets is a constitutionally protected exercise of the right of freedom of press, and cannot be abridged by local law.

Schneider v. State, 308 U.S. 147, 60 S. Ct. 146, 84 L. Ed. 118

Lovell v. Griffin, 303 U. S. 444, 58 S. Ct. 666, 82 L. Ed. 949

So also, this Court has held that a municipality

cannot deny or abridge the right peaceably to assemble.

Hague v. C.I.O., 307 U.S. 496, 59 S. Ct. 954, 83 L. Ed. 1423

Nor, under the guise of regulating the use of the streets or sidewalks, can a municipality abridge or deny the liberty of speech, press and assemblage.

Schneider v. State, supra

Judging Ordinance 3-6.01 by its four corners, petitioners contend that it violates the principles enunciated in the cases cited above. The municipality of Oakland offers in support of the validity of the Ordinance the argument that the Ordinance is designed simply toward regulating the use of the streets and keeping them free and clear for the use of the general public. We do not say that a municipality cannot regulate the use of its streets in the interests of the general public, because obviously, a municipality has both the right and duty to do so. But under the guise of regulating the use of the streets, a municipality cannot by this kind of Ordinance prohibit the exercise by persons of their constitutional liberties of speech, press and assemblage. This Ordinance does not take into account the exercise by persons of those rights, and insofar as it fails in that respect, it is void as invading and denying guaranteed constitutional liberties.

A reference to the Ordinance will reveal that it excepts from its prohibitions the obstruction of the streets "on account of public meetings." Since it contains such an exception, it would seem to us that it should also except the

use of the streets by persons for the purposes of exercising the rights of speech, press and assemblage in such a way as to not seriously interfere with the rights of the general public. The evidence in this case clearly shows that all of the activities of petitioners were peaceful and lawful; that they did not try to prevent the general public from using the sidewalk, and that in fact, the general public did use the sidewalk. Nevertheless, the Ordinance was used against petitioners in such a way that it denied guaranteed constitutional rights. The fact that the Ordinance was subjected to such use indicates that it is that kind of an all-inclusive restraint upon liberty of expression which this Court has found violative of the due process of law clause of the Fourteenth Amendment.

Thornhill v. Alabama, supra

2. Ordinance 3-6.01 violates the due process of law clause of the Fourteenth Amendment in that it is altogether vague and indefinite, and does not create or set up any reasonably ascertainable standards of guilt.

This Court has held that a penal statute must definitely and explicitly define its terms and that "no one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes."

Lanzetta v. New Jersey, 306 U.S. 451, 59 S. Ct. 618, 83 L. Ed. 888

This Court has frequently stricken down laws abridg-

ing civil liberties because they are vague and indefinite. It has done so because the statute in question prohibits the exercise of constitutional rights in a peaceful manner for lawful purposes, as well as the unlawful exercise of those rights for unlawful purposes.

Fiske v. Kansas, 274 U.S. 380, 7 S. Ct. 655, 71 L. Ed. 1108

Herndon v. Lowry, 301 U.S. 242, 57 S. Ct. 732, 81 L. Ed. 1066

Stromberg v. California, 283 U.S. 359, 51 S. Ct. 532, 75 L. Ed. 1117

Hague v. C.I.O., supra

Schneider v. State, supra

Carlson v. California, supra

Thornhill v. Alabama, supra

No where in Ordinance 3-8.01 is there any definition of the terms "free passage," "obstructed," "crowd," "disperse," "move on."

It is apparent that the presence of any person upon a street causes some obstruction and some interference with the free passage along said street of other persons. Peaceful pickets unquestionably have a right to picket upon the streets, and persons unquestionably have a right to distribute leaflets to those who will take them, upon the streets. Such activity, in some measure, obviously obstructs free passage along the street. Is such activity subject to punishment under the Ordinance? In this case, it would seem so, although

the evidence clearly shows only the exercise by petitioners of constitutionally protected rights. There is nothing in this Ordinance to indicate to petitioners just what activity they may engage in, which this Court has said is their right, but which the municipality of Oakland is now denying by the application of this Ordinance.

What constitutes a "crowd?" Does it mean that a person must be a part of a crowd before he is subject to punishment under this Ordinance? Or does it mean that if he engages in activity which draws a crowd to watch him that he is subject to punishment? In this case, it would seem that nineteen (19) pickets on a wide sidewalk, marching close together in an uneven circle would not obstruct the sidewalk, but the evidence also shows that the nineteen (19) pickets drew a crowd of from four to five hundred persons. Are the pickets responsible and liable for the acts of this crowd which has been attracted? Nother in the Ordinance informs petitioners of the answer to this question.

Nor is there any indication as to what is meant by "disperse," or "move on." Must a person, instructed by a police officer to do so, completely leave the scene? If so, what becomes of that person's right to peacefully picket and distribute leaflets? These rights become empty ones if they cannot be exercised at the place where the controversy causing the picketing and distribution of leaflets occurred.

Such an Ordinance as this becomes a dragnet to

prohibit and punish peaceful and lawful acts where the persons involved have incurred the enmity of the law enforcement officials or other persons powerful in the community. Such is the case here. We have a small group attempting to publicize the facts of a serious economic question -- the economic plight of the Negroes. Yet, immediately upon attempting to publicize the facts of this controversy, the persons engaged in this activity are told to move on by the police, and then, if they refuse, they are arrested and prosecuted, as occurred in this case.

We submit that this law is so all-inclusive in its terms, that it punishes lawful and peaceful acts; that it fails to define its terms, or set up reasonably ascertainable standards of guilt, and that it is, therefore, void.

See: Hawaii v. Anduha, 48 Fed. (2d) 171

3. Ordinance 3-8.01 was enforced and applied against petitioners in the instant case in an unconstitutional manner, in that petitioners were deprived of liberty of speech, press and assemblage, and deprived of property without due process of law in violation of the Fourteenth Amendment.

This Court has held that while a statute may be valid, it nevertheless cannot be enforced to take away liberty of speech, press and assemblage, and that where the evidence shows a defendant to have been engaged in the exercise of such rights, that he cannot be punished under such statute.

Fiske v. Kansas, supra

De Jonge v. Oregon, supra

Harndon v. Lowry, supra

The facts in this case plainly show that petitioners were engaged in peaceful picketing, carrying banners, and distributing leaflets, to publicize the facts of the Jobs for Negroes campaign, and nothing more. Yet, they were charged and convicted, and the convictions affirmed, of violating a so-called 'Move-on' ordinance. To permit such a decision to stand, would be to nullify and circumvent the decisions of this Court in Schneider v. State, supra; Carlson v. California, supra, and Thornhill v. Alabama, supra.

In other words, we make the point that a municipality cannot do indirectly what it is forbidden to do directly. A municipality either by ordinance or administrative act cannot deny or prohibit peaceful picketing, carrying banners, distributing leaflets, or peaceful assemblage. Therefore, it cannot prohibit the exercise of these rights indirectly by the application of an ordinance such as Ordinance 3-6.01. This most important question calls for a decision from this Court reversing the court below in this case, so that it will be clear that those rights of speech, press and assemblage guaranteed by the Fourteenth Amendment, shall be free from interference, no matter what the ordinance, statute or administrative act is that attempts to prohibit the exercise of these rights.

So also, does the refusal of the courts below to

give the requested instructions constitute an unconstitutional application of Ordinance 3-6.01.

Finally, there is not in this case any "clear and present danger" that any substantive evil will occur which the State has the right to prevent. The incidental obstruction of a street or sidewalk by a person engaged in exercising those fundamental rights of speech, press and assemblage protected by the Fourteenth Amendment, should not be punished as a crime in the light of the "clear and present danger" rule.

Schenck v. United States, 249 U.S. 47, 39 S. Ct. 247, 63 L. Ed. 470

Herndon v. Lowry, Supra

De Jonge v. Oregon, supra

VI.

CONCLUSION

For the reasons both in law and in fact, set out herein, petitioners respectfully submit that they were deprived of liberty and property without due process of law within the meaning of the Fourteenth Amendment, and that therefore certiorari should be granted and the judgment of the Superior Court of the State of California, in and for the County of Alameda, should be reversed.

DATED: San Francisco, California

December 16, 1940

GEORGE R. ANDERSEN

GEORGE OLSHAUSEN
Of Counsel

Respectfully submitted,

HERBERT RESNER
Attorney for Petitioners

CERTIFICATE OF COUNSEL

STATE OF CALIFORNIA }
CITY AND COUNTY OF SAN FRANCISCO } ss

HERBERT RESNER, being first duly sworn, upon his oath deposes and says: That he is the attorney for the petitioners in the above and foregoing cause; that he has read and considered the foregoing petition for a writ of certiorari; together with the supporting brief, and is familiar with the contents of such petition and brief; and in affiant's judgement such petition is well founded; that this petition is presented in good faith, and the same is not interposed for delay.

HERBERT RESNER

Subscribed and sworn to before me
this 16th day of December, 1940

ALICE B. HORSE (SEAL)
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